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| 09/816,016      | 03/23/2001  | Betsy P. Colwell     | 02200-1             | 9104             |

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EXAMINER

VALENTI, ANDREA M

| ART UNIT | PAPER NUMBER |
|----------|--------------|
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3643

DATE MAILED: 02/24/2005

Please find below and/or attached an Office communication concerning this application or proceeding.

## Office Action Summary

**Application No.**

09/816,016

**Applicant(s)**

COLWELL, BETSY P.

**Examiner**

Andrea M. Valenti

**Art Unit**

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-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

### Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If the period for reply specified above is less than thirty (30) days, a reply within the statutory minimum of thirty (30) days will be considered timely.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

### Status

- 1) ☒ Responsive to communication(s) filed on 10 December 2004.
- 2a) ☒ This action is **FINAL**. 2b) ☐ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

### Disposition of Claims

- 4) ☒ Claim(s) 1,3-5,7-23,26-30,32-37 and 39-45 is/are pending in the application.
- 4a) Of the above claim(s) \_\_\_\_\_ is/are withdrawn from consideration.
- 5) ☐ Claim(s) \_\_\_\_\_ is/are allowed.
- 6) ☒ Claim(s) 1,3-5,7-23,26-30,32-37 and 39-45 is/are rejected.
- 7) ☐ Claim(s) \_\_\_\_\_ is/are objected to.
- 8) ☐ Claim(s) \_\_\_\_\_ are subject to restriction and/or election requirement.

### Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☒ The drawing(s) filed on 23 March 2001 is/are: a) ☐ accepted or b) ☒ objected to by the Examiner.  
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).  
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

### Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).  
a) ☐ All b) ☐ Some \* c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
2. ☐ Certified copies of the priority documents have been received in Application No. \_\_\_\_\_.
3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).
- \* See the attached detailed Office action for a list of the certified copies not received.

### Attachment(s)

- 1) ☒ Notice of References Cited (PTO-892)
- 2) ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948)
- 3) ☐ Information Disclosure Statement(s) (PTO-1449 or PTO/SB/08)  
Paper No(s)/Mail Date \_\_\_\_\_.
- 4) ☐ Interview Summary (PTO-413)  
Paper No(s)/Mail Date. \_\_\_\_\_.
- 5) ☐ Notice of Informal Patent Application (PTO-152)
- 6) ☐ Other: \_\_\_\_\_.

## **DETAILED ACTION**

### ***Allowable Subject Matter***

The indicated allowability of claims 2-5, 8-20, 33-36, 39 and 40 is withdrawn in view of the newly discovered reference(s) to U.S. Patent No. 5,558,040 and DUNCRAFT, Winter & Holidays 1999 "specialties for Enjoying Wild Birds" Penacook, NH, pgs 1-48 (items 180M, 183M, 181M, 188M, 161M). Rejections based on the newly cited reference(s) follow.

### ***Drawings***

The drawings are objected to under 37 CFR 1.83(a). The drawings must show every feature of the invention specified in the claims. Therefore, the top of the selective housing including apertures as claimed in claim 13 must be shown or the feature(s) canceled from the claim(s). No new matter should be entered.

Corrected drawing sheets in compliance with 37 CFR 1.121(d) are required in reply to the Office action to avoid abandonment of the application. Any amended replacement drawing sheet should include all of the figures appearing on the immediate prior version of the sheet, even if only one figure is being amended. The figure or figure number of an amended drawing should not be labeled as "amended." If a drawing figure is to be canceled, the appropriate figure must be removed from the replacement sheet, and where necessary, the remaining figures must be renumbered and appropriate changes made to the brief description of the several views of the drawings for consistency. Additional replacement sheets may be necessary to show the renumbering of the remaining figures. Each drawing sheet submitted after the filing date of an

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application must be labeled in the top margin as either "Replacement Sheet" or "New Sheet" pursuant to 37 CFR 1.121(d). If the changes are not accepted by the examiner, the applicant will be notified and informed of any required corrective action in the next Office action. The objection to the drawings will not be held in abeyance.

***Claim Rejections - 35 USC § 112***

The following is a quotation of the second paragraph of 35 U.S.C. 112:

The specification shall conclude with one or more claims particularly pointing out and distinctly claiming the subject matter which the applicant regards as his invention.

Claim 36, 37 and 39 are rejected under 35 U.S.C. 112, second paragraph, as being indefinite for failing to particularly point out and distinctly claim the subject matter which applicant regards as the invention.

Claim 37 recites the limitation "the top" in line 2. There is insufficient antecedent basis for this limitation in the claim.

Claim 36 recites the limitation "the removable top" in line 6. There is insufficient antecedent basis for this limitation in the claim.

Claim 39 is rejected as being dependent upon a rejected base claim.

***Claim Rejections - 35 USC § 102***

The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:

A person shall be entitled to a patent unless –

(a) the invention was known or used by others in this country, or patented or described in a printed publication in this or a foreign country, before the invention thereof by the applicant for a patent.

Claims, 1, 3-5, 7, 9-12, 17-23, 26, and 33-35 are rejected under 35 U.S.C. 102(a) as being anticipated by DUNCRAFT, Winter & Holidays 1999 "specialties for Enjoying Wild Birds" Penacook, NH, pgs 1-48.

Regarding Claim 1, DUNCRAFT teaches a selective bird feeder, comprising: a selective housing having at least one sidewall and a base; a seed holder contained within the selective housing and including a base; a space disposed between a sidewall of the seed holder and the at least one sidewall of the selective housing; a fastening member constructed and arranged to removably secure the base of the selective housing to the base of the seed holder (based on the broadly recited limitation of "fastening member" the examiner maintains that DUNCRAFT in fact teaches this member or else the device of DUNCRAFT would come apart and the bottom would drop down when suspended); a top adjacent an upper edge of the selective housing; wherein, upon removal of the fastening member, the selective housing and the base of the selective housing are disconnected from the seed holder such that a user can remove the selective housing and the base of the selective housing from engagement with the base of the seed holder (DUNCRAFT item 180M, 181M, 188M, 161M.)

Regarding Claims 3-5, DUNCRAFT inherently teaches that the space is about 1inch, 1.5 inches, or 2 inches since DUNCRAFT teaches that the space is great enough that a squirrel cannot reach the feed.

Regarding Claim 7, DUNCRAFT teaches the base of the selective housing is substantially solid (DUNCRAFT item 180M, 181M, 188M, 161M).

Regarding Claims 9-11, DUNCRAFT inherently teaches that the at least one sidewall of the selective housing includes apertures having a maximum dimension of about 1, 1.5, or 2 inches since the apertures have to be large enough for a chickadee or nuthatch to fit through as taught by DUNCRAFT (DUNCRAFT write up for item 180M and Fig for 180M).

Regarding Claim 12, DUNCRAFT teaches that the top of the selective housing is substantially solid (DUNCRAFT 180M).

Regarding Claim 17, DUNCRAFT teaches the removable top directly contacts the seed holder (DUNCRAFT item 180M, 181M, 188M, 161M).

Regarding Claim 18, DUNCRAFT teaches the seed holder includes a cap and the removably top directly contacts the cap (DUNCRAFT item 183M).

Regarding Claim 19, DUNCRAFT teaches the removable top is spaced apart from the seed holder (DUNCRAFT item 183M the top contacts the cap of the seed holder, but not actually the seed holder).

Regarding Claim 20, DUNCRAFT teaches that the top includes an aperture through which a portion of the seed holder extends (DUNCRAFT item 180M).

Regarding Claim 21, DUNCRAFT teaches the seed holder includes a cap, and further comprising a space between the removable top and the cap (DUNCRAFT item 180M).

Regarding Claims 22 and 23, DUNCRAFT inherently teaches the spacing between the cap and the removable top is adjustable (do to the broad nature of this limitation the examiner maintains that the same can merely depend on the length of the

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inner tube in relation to the outer tube and is thus inherently has the capability of being adjustable).

Regarding Claim 26, DUNCRAFT teaches the hanger attached to the seed holder, wherein the hanger extends through the top (DUNCRAFT item 188M).

Regarding Claim 33, DUNCRAFT teaches a hanger attached to the seed holder (DUNCRAFT item 180M, 181M, 188M, 161M.).

Regarding Claim 34, DUNCRAFT teaches the top further includes an aperture sized and dimensioned to receive the hanger therethrough (DUNCRAFT item 161M).

Regarding Claim 35, DUNCRAFT teaches the aperture is sized and dimensioned to receive the seed holder therethrough (DUNCRAFT item 161M).

### ***Claim Rejections - 35 USC § 103***

The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

Claim 8 is rejected under 35 U.S.C. 103(a) as being unpatentable over DUNCRAFT, Winter & Holidays 1999 "specialties for Enjoying Wild Birds" Penacook, NH, pgs 1-48 in view of U.S. Patent No. 5,791,286 to Taussig et al.

Regarding Claim 8, DUNCRAFT does not explicitly teach that the base of the base of the selective housing has apertures. However, Taussig et al teaches a base with apertures (Taussig #24). It would have been obvious to one of ordinary skill in the art to modify the teachings of DUNCRAFT with the teachings of Taussig at the time of

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the invention as a means to remove undesirable moisture from the feed to prevent clumping.

Claims 13 and 14-16 are rejected under 35 U.S.C. 103(a) as being unpatentable over DUNCRAFT, Winter & Holidays 1999 "specialties for Enjoying Wild Birds" Penacook, NH, pgs 1-48.

Regarding Claim 13, DUNCRAFT items 180M, 181M, 188M, 161M are silent on the top of the selective housing has apertures. However, DUNCRAFT item 126, 127, 0068 teaches apertures in the top of the selective housing. It would have been obvious to one of ordinary skill in the art to modify the teachings of DUNCRAFT 180M, 181M, 188M, 161M with the teachings of DUNCRAFT 126, 127, 0068 at the time of the invention for the advantage of giving birds access to the feeder from an alternate direction and for ventilation of the device.

Regarding Claims 14-16, DUNCRAFT as modified in claim 12 inherently teaches aperture dimensions of about 1, 1.5, or 2 inches since they need to be wide enough to permit the birds access to the seed.

Claims 27-30, 32, 36, 37, and 41-45 are rejected under 35 U.S.C. 103(a) as being unpatentable over DUNCRAFT, Winter & Holidays 1999 "specialties for Enjoying Wild Birds" Penacook, NH, pgs 1-48 in view of U.S. Patent No. 5,558,040 to Colwell et al.



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Regarding Claim 27-30, 32, 36, 37, 39, and 40, DUNCRAFT teaches a selective bird feeder, comprising: a selective housing having a cylindrical sidewall and including apertures having a width ranging from about 1.3 inches to about 1.7 inches and the sidewall having a base; a cover separate from and supported at least on the cylindrical sidewall of the selective housing; a cylindrical seed holder contained within and spaced apart from the cylindrical sidewall of the selective housing and having a base; and a seed holder cap closing the top of the cylindrical seed holder; a hanger attached to the seed holder; the cover including an aperture through which a portion of the seed holder extends (DUNCRAFT item 180M, 181M, 188M, 161M).

DUNCRAFT is silent on a clamp separate from said hanger disposed between said cover and cap to prevent removal of said cover. However, Colwell teaches a clamp for preventing the removal of a cover on a seed holder (Colwell #85 and 81) placed about the top/cover. It would have been obvious to one of ordinary skill in the art to modify the teachings of DUNCRAFT with the teachings of Colwell at the time of the invention to prevent vertical displacement of the cover as taught by Colwell and for a structurally secure assembly in high winds to prevent vertical displacement along the length of the seed holder.

Regarding Claim 41, DUNCRAFT as modified teaches the clamp comprises a spring claim (Colwell #85 and Fig. 8).

Regarding Claim 42, DUNCRAFT as modified teaches the clamp comprises a rib formed in the outer surface (Colwell #85 the clamp itself is the rib).

Regarding Claim 43, DUNCRAFT as modified is silent on the rib being an annular rib integrally formed with the seed holder. However, it would have been obvious to one of ordinary skill in the art to further modify the teachings of DUNCRAFT at the time of the invention since the modification is merely make a known element integral as an engineering manufacturing design choice to prevent the consumer from losing pieces to the assembly and does not present a patentably distinct limitation [*In re Larson*, 340 F.2d 965, 967, 144 USPQ 347, 349 (CCPA 1965)].

Regarding Claim 44, DUNCRAFT as modified is silent on a wing nut clamp as another possible embodiment for the design. However, it would have been obvious to one of ordinary skill in the art to further modify the teachings of DUNCRAFT at the time of the invention since the modification is merely the selection of an alternate old and notoriously well-known fastening means performing the same intended function for prevent vertical displacement, selected merely as an engineering manufacturing design choice to provide more ergonomic ease of assembly for the elderly.

Regarding Claim 45, DUNCRAFT as modified is silent on the annular rib on the seed holder being below the cover. However, it would have been obvious to one of ordinary skill in the art to further modify the teachings of DUNCRAFT at the time of the invention since the modification is merely shifting the location of a known element (Colwell #85) to prevent vertical displacement downward when a large load rests on the top.

Regarding Claim 39, DUNCRAFT as modified teaches the top is substantially dome-shaped, and the outer edge of the top extends below the upper edge of the selective housing (DUNCRAFT 188M).

Regarding Claim 40, DUNCRAFT as modified is silent on the top is substantially transparent plastic. However, it would have been obvious to one of ordinary skill in the art to further modify the teachings of DUNCRAFT at the time of the invention since the modification is merely the selection of known material for intended use to provide an aesthetic design to have the feed blend more naturally with its surroundings and does not present a patentably distinct limitation [*In re Seid*, 161 F.2d 229, 231, 73 USPQ 431, 433 (CCPA 1947)] and [*In re Leshin* 125 USPQ 416].

### ***Response to Arguments***

Applicant's arguments with respect to claims 1, 3-5, 7-23, 26-30, 32-37, 39-45 have been considered but are moot in view of the new ground(s) of rejection.

### ***Conclusion***

The prior art made of record and not relied upon is considered pertinent to applicant's disclosure: U.S. Patent No. 4,327,669; U.S. Patent No. 4,355,597; U.S. Patent No. 3,568,641; U.S. Patent No. 5,826,541.

Applicant's amendment necessitated the new ground(s) of rejection presented in this Office action. Accordingly, **THIS ACTION IS MADE FINAL**. See MPEP § 706.07(a). Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

A shortened statutory period for reply to this final action is set to expire THREE MONTHS from the mailing date of this action. In the event a first reply is filed within TWO MONTHS of the mailing date of this final action and the advisory action is not mailed until after the end of the THREE-MONTH shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of the advisory action. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the date of this final action.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Andrea M. Valenti whose telephone number is 703-305-3010. The examiner can normally be reached on 7:30am-5pm M-F; Alternating Fridays Off.

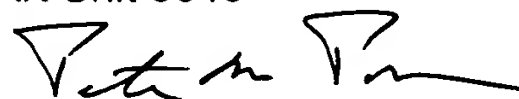
If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Peter M. Poon can be reached on 703-308-2574. The fax phone number for the organization where this application or proceeding is assigned is 703-872-9306.

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Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free).



Andrea M. Valenti  
Patent Examiner  
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17 February 2005